IN THE SUPREME COURT OF FLORIDA

Case No. SC16-1976

LUIS TORRES JIMENEZ,

Petitioner,

v.

CITY OF AVENTURA, et al.,

Respondents.

PETITIONER'S REPLY BRIEF

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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TABLE OF CONTENTS

PAGE

ABBREVIATIONS USED

"A. Br." for Amicus Brief of Florida League of Cities, et al.

"AG Br." for The Attorney General's Answer Brief

"C. Br." for Answer Brief on Merits of City of Aventura

"I. Br." for Petitioner's Initial Brief

"C. App'x" for Appendix to City of Aventura's Answer Brief on Merits

"P. App'x" for Petitioner's Appendix to Initial Brief

"R. App'x" for Appendix to Petitioner's Reply Brief

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TABLE OF AUTHORITIES

PAGE

CASES

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STATUTES

LEGISLATIVE HISTORY

ARGUMENT

I. PRINCIPLES OF STATUTORY INTERPRETATION SUPPORT A LIMITED READING OF THE MEANING OF "REVIEW."

Respondents largely duck the statutory interpretation analysis. They make almost no effort to engage the debate over important elements of the interpretative analysis of the statute. The City derides Jimenez's exhaustive interpretative effort as an "excursion through the legislative weeds" (C. Br. at 10) and an exercise in "rummag[ing] through the proverbial attic of statutory interpretation principles" (*id.* at 19). But Jimenez has done no more than to follow this Court's repeated jurisprudence on proper methods of statutory interpretation. *See generally Hardee Cnty. v. FINR II, Inc.*, 221 So. 3d 1162 (Fla. 2017); *DeBaun v. State*, 213 So. 3d 747 (Fla. 2017); *Crews v. State*, 183 So. 3d 329 (Fla. 2016). At nearly every turn in the analysis, Respondents fail to offer a persuasive rejoinder.

We begin with the meaning of the central word "review."[1] The Attorney General does not contest the conclusion, based on an analysis of the plain meaning of the word, that it is ambiguous in the context in which it was used. *See* AG Br. at

[1] The City's half-hearted assertion (at 21 n.10) that judicial estoppel bars this Court from considering Jimenez's contention regarding the meaning of "review" fails. Judicial estoppel applies only when a party has taken conflicting positions. *Blumberg v. USAA Casualty Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001). The City has not even pointed out that conflict. It never raised the contention in the Third District despite extensive briefing there on the meaning and application of "review." Plus, "[t]here can be no judicial estoppel … where the positions taken involve solely a question of law," *id.*, as this issue does.

24; *compare* I. Br. at 23. The City seems to disagree,[2] but fails to dispute the starting point that the word is susceptible to "two plausible understandings" in section 316.0083(1)(a), depending upon the purpose of the review the Legislature intended. I. Br. at 23. Rather, the City merely picks one of those plausible meanings – a broad and "unrestricted" interpretation (C. Br. at 10, 21) – and argues why it is correct. Neither Respondent has effectively contested the point that the meaning of "review" as used in the statute is ambiguous. Consequently, resort to interpretative tools is entirely proper. *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012). Indeed, the City embraces and wields such tools itself. *See* C. Br. at 23.

The City offers no rejoinder to Jimenez's point about the statutory structure: that the specification in section 316.0083(1)(a) of what an agent may review (the camera images) logically implies a limitation on the agent's freedom to review anything else. I. Br. at 22-23 (discussing *expressio unius* principle). The Attorney General also fails to dispute the applicability of this principle. Instead, trying to

[2] The City says it could not locate any case that ever held the term "review" to be ambiguous or confusing. C. Br. at 22 n.12. There are such decisions, *e.g.*, *Gallia Cty. Veterans Serv. Comm'n v. Gallia Cnty. Bd. of Cty. Comm'rs*, No. 95CA13, 1996 WL 103812, *4 (Ohio Ct. App. Mar. 6, 1996) (holding "review," as used in statute, to be "ambiguous" because it "could mean to examine or to revise"), and others have addressed disputes over the word's meaning, *e.g.*, *In re the Babcock & Wilcox Co.*, No. 08-3608, 2008 WL 4809486, *3-4 (E.D. La. Oct. 31, 2008) (analyzing whether the right to "review" information encompassed the right to disseminate it); *Cytyc Corp. v. TriPath Imaging, Inc.*, 505 F. Supp. 2d 199, 221 (D. Mass. 2007) (noting that "some portion of the population will often use the term 'review' to denote an initial [rather than subsequent] examination").

shift the interpretative burden that flows naturally from this statute's language and this interpretative canon, the Attorney General contends that "Jimenez offers no reasonable explanation as to why the Legislature would authorize a review of images, but not permit a local government to provide directions as to what standards should be applied in that review process." AG Br. at 24.

That argument ignores the detailed explanation Jimenez proffered for why his interpretation is reasonable. *See* I. Br. at 24-28. The statutory scheme depends upon the completeness and usability of the photographic evidence, so it makes sense that the Legislature would have intended the review to facilitate that central purpose. *Id*. at 27-28.[3] By contrast, Respondents' position that "review" should be read so broadly as to (silently) authorize local governments to utilize their own disparate standards to sort camera data runs counter to the Act's purpose of establishing uniform statewide standards for the use of red light cameras. *Id*. at 26, 45-46. Jimenez's reading of the statute is not only reasonable, but the only reading that accords with the text and purpose of the Act. Respondents, by contrast, advocate an unrestricted view of the term "review" that lacks support in the text, structure, or purpose of the Act – and fail their own test of articulating why that alternative reading is reasonable.

[3] The reasonableness of that understanding of such a review function finds confirmation in both the "pre-sorting review" that ATS does for the City as well as the City's own ordinance. *Id*. at 25-26.

The legislative history of the Act buttresses the reasonableness of a circumscribed reading of the type of review contemplated. That history unambiguously evidences how the Legislature limited the role a private contractor may play in the enforcement process. I. Br. at 29-31. Neither Respondent contests this reading of the legislative history.[4] The City's claim that Jimenez's methodical tracing of this issue through the legislative history is "selective" and involves "cherry-pick[ing]" (C. Br. at 22, 27) is no more than empty rhetoric.

The City then engages in the very practice it criticizes, seeking to elevate to "dispositive" status the fact that the staff analyses of the bill reference Federal Highway Administration guidance that identifies options for red-light camera system operations that, among myriad other things, allow private contractors to review camera data to identify violations. C. Br. at 27-30, 37. The staff analyses only reference the federal guidance *generally*; they make no mention of its substance regarding the role of private contractors or cite anything specific from the 50-page document. *See, e.g.*, Fla. H. Fin. & Tax Council, CS for HB 325 (2010) Staff Analysis at 3 & n.10 (Apr, 19, 2010). And while the identical general reference to the federal guidance appears in all of the staff analyses, the legislators shrank the role of private contractors as the bill progressed. *See* I. Br. at 29-31. In

[4] The initial brief contains a scrivener's error on the first line of page 31. It should say "*employees* as traffic infraction enforcement officers," not "*employees* as independent contractors as traffic infraction enforcement officers."

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view of that distinct evidence of legislative intent, the static reference to the federal guidance as background material in the staff analyses sheds even less light. It is hardly the "*endorse[ment]*" of substantive review the City claims. C. Br. at 27.

But, taking the City' argument on its own terms, if the Legislature *was* indeed "fully aware" (*id*. at 30) of the fact, appearing on page 27 of the federal guidance, that private contractors could "'[r]eview recorded violations data *to identify violations*'" (*id*. at 29 (quotation omitted; emphasis modified)), what then should be made of the fact that the Legislature did *not* use such specific language in the statute? The fact that the Legislature was aware of a specific proposal to empower a private contractor with such a substantive review but chose *not* to expressly confer that authority, particularly where the Legislature shrank the role of private contractors during the drafting process, arguably indicates an intention to *preclude* it. *Cf. Alachua Cty. v. Expedia, Inc.*, 175 So. 3d 730, 735 (Fla. 2015) (three-Justice opinion) (where a specific proposal is raised in but not adopted by the Legislature, it may be treated as a legislative rejection of the proposal).

The same could be said regarding the City's contention that because the federal guidance envisions local governments "developing 'guidelines to be applied for issuing citations'" supposedly well beyond what the City's BRQ provide, the BRQ must therefore be within the ambit of the Act. C. Br. at 31 (quoting federal guidance). The Act makes no provision for such local guidelines.

That omission is particularly significant in a statute expressly designed to create a uniform statewide scheme for the regulation of the use of red light cameras to enforce traffic laws. Again, the omission from the actual statute adopted proves far more than a reference to a potential aspect of a program buried in the middle of a document mentioned only as background in the staff analyses of the bill.

At the same time, Respondents say nothing about the pre-existing use of cameras in Florida to enforce toll violations, which the legislative staff also referenced. *See* I. Br. at 31-32. They cannot dispute that a closely parallel, pre-existing system in the state existed for the "review [of] captured photographic images of vehicle license plates to ensure accuracy and data integrity," *id*. at 32 (quotation omitted). The generic federal guidance cannot be accorded greater weight than this existing Florida administrative regulation.

The City also places great weight on the Legislature's supposed awareness of details of existing municipal red light camera programs at the time of the adoption of the Act. (C. Br. at 23). No doubt the Legislature was generally aware that some local governments were using traffic infraction detectors to enforce local ordinances, but that does not evidence an awareness of the role private contractors were playing in the review of camera images. The City urges the Court to apply the rule of statutory construction that "the Legislature is presumed to be aware of the state of the law" (C. Br. at 23) to the operational details of ordinances. That

would be an unprecedented and unwarranted extension of the rule, which has been applied to pre-existing judicial construction of a statute, *Crescent Miami Ctr., LLC v. Fla. Dept. of Rev.*, 903 So. 2d 913, 918 (Fla. 2005), or of common law principles, *Fla. Convalescent Ctrs. v. Somberg*, 840 So. 2d 998, 1007 (Fla 2003), and to administrative agency rules interpreting a statute, *Dep't of Rev. v. Bonard Enter., Inc.*, 515 So. 2d 358, 359 (Fla. 2d DCA 1987). But Jimenez is aware of no case in which the rule has been stretched to apply to a mere "matter of public record," as the City urges "[t]he operation of municipal red light camera programs in 2010" and unspecified "decisions to implement such programs" were. C. Br. at 23. Moreover, the City does not identify even a single example of a public record evidencing that a local government entrusted a private contractor with a substantive review of camera data. Nor does the City claim that any judicial ruling challenging a municipal red light camera program flagged this issue.

The fact that the Legislature has amended the Act four times without touching the provision regarding "review of information from a traffic infraction detector" has no interpretative value. Aborted "legislative efforts to further curtail or repeal red light camera programs" (C. Br. at 24) shed no light in the absence of any proposed amendment that targeted the "review" issue.

The annual reports that the Florida Department of Highway Safety and Motor Vehicles has submitted to the Legislature in recent years concerning local

governments' operation of red light camera programs fall short of evidencing any legislative foreknowledge of an interpretative debate over the meaning of "review." The stray, cryptic references to "Business Rules" or "BRQ" in the reports' appendices are certainly not "specific references" (C. Br. at 25) to any practice elucidating substantive review by contractors of camera images.[5] And while the reports undoubtedly reveal that some municipalities have utilized private contractors to review camera images, the reports do not parse the *nature* of that review. *See* C. Br. at 26. It is misleading to suggest that these reports "made [the Legislature] aware of the role private contractors were playing in reviewing images[.]" *Id*. The reports are utterly inconclusive about that particular issue. The City's leap that the absence of an amendment of the statute "to clarify what 'review' meant" therefore signifies an implicit ratification of a particular interpretation of the term, *id*., is unwarranted.

In summary, nothing the Respondents address in their briefs weakens the reasonableness of Jimenez's interpretation of "review" in the Act. Faithful adherence to traditional principles of statutory interpretation supports the

[5] Space constraints preclude elaborating on the four references the City cites, but they are buried in very small font deep within lengthy charts that comprise appendices to the reports. They are little more than scattered, passing references to the words "business rules" and "BRQ" without elaboration of the nature of review being performed pursuant to them.

conclusion that the Legislature did not invite a private contractor's substantive evaluation of the camera images pursuant to some unknown standards.

The Attorney General is mistaken that just because all parties agree that the word "review" contemplates some degree of evaluation and screening of images "the proper inquiry [then] shifts to whether the review process involves any unlawful delegation of governmental power[.]" AG Br. at 25. That pivot skips over the analysis of the meaning of the term "review," and assumes, improperly, that it is unbounded. But it is not, as the context of the statute and its history reveal. The Attorney General thus invites the same error that the Third District committed – forsaking a rigorous analysis of the meaning of the statutory term. The statute does not open the door to a delegated-power inquiry, since the Legislature authorized no more than the use of an agent to examine the images for completeness and usability.[6]

The City is mistaken that the statute had to say "review for completeness and usability" for that interpretation to be valid. *See* C. Br. at 31. As explained, the conclusion flows from the context in which "review" was used, the role of the camera images in the statutory scheme, and the 2010 Legislature's evident intent to narrow the role of private contractors in the use of red light cameras. Jimenez's

[6] Respondents are correct that Jimenez has conceded before this Court the unlawful delegation challenge brought below. That concession flows in part from respect for the Court's declination of jurisdiction based on conflict.

point about "express authorization" relates, instead, to the extra-statutory BRQ standards used to govern vendor review. *See* I. Br. at 14, 40. That distinct point implicates the doctrine of preemption. *See* Section II, *infra*.

The City is also mistaken in arguing that that Jimenez has somehow "conce[ded]" that the statute allows the contractor "to make certain substantive assessments," namely whether the vehicle stopped at a specific point. C. Br. at 35 (citing I. Br. at 25). Jimenez's point is that ATS's "pre-sorting review" is precisely the kind of limited review of the completeness and usability of the images contemplated by the statute. I. Br. at 25. To get from this argument to the "concession" the City claims requires distortion and elision of context.[7]

In sum, the Legislature limited local governments' authority to enlist the assistance of private contractors in the red-light-camera enforcement process to

[7] In pointing out that such limited review involves only a determination that the images "contain[] the necessary information required by the statute," we quoted section 316.003(87), the provision identifying that information: "two … images or streaming video of only the rear of a motor vehicle at the time the vehicle fails to stop behind the stop bar or clearly marked stop line when facing ... a steady red light … includ[ing] a[n] ... image ... [of] the license tag ... and the [red light]." The City emphasizes (at 35) the timing factor, arguing that "ATS processors must determine whether the vehicle, in fact, failed to stop at a specific point." The City's contention ignores that the cameras are pre-set to trigger based on certain movement at the time the light turns red. That calibration happens long before a vendor reviews the resulting photographic images. The "pre-sorting review," which looks only at whether the A-shot and B-shot match and whether the license plate was also visibly captured (R.1376-77), requires no assessment of whether the vehicle failed to stop at a specific point. That is law enforcement's job.

performing a review of the images for completeness and usability. Nothing more. *See* I. Br. at 33-36 (discussing implications for mailing and transmitting citations).

II. THE CITY HAS NO POWER TO ENLIST A PRIVATE CONTRACTOR TO EVALUATE CAMERA IMAGES USING THE CITY'S OWN SUBSTANTIVE STANDARDS.

The arena of regulation of the use of red light cameras for purposes of enforcement of the traffic laws is one which has been expressly preempted to the State. *City of Ft. Lauderdale v. Dhar*, 185 So. 3d 1232, 1235 (Fla. 2016); *D'Agastino v. City of Miami*, 220 So. 3d 410, 430 (Fla. 2017) (Pariente, J., concurring) (same). A municipality, therefore, lacks power to act in this space unless the Legislature has so "*expressly authorized*." *Masone v. City of Aventura*, 147 So. 3d 492, 497 (Fla. 2014). The Legislature only authorized municipalities to delegate to private contractors the review of the photographic images themselves, for completeness and usability. Once the statute is so construed within this expressly preempted field, there is no room for the City's enforcement scheme whereby it adopts substantive standards for its contractor to use to winnow out images from the universe its cameras capture and forward only some for the City's consideration for prosecution. Such an enforcement regime is not expressly authorized by the Act. There simply is no provision in section 316.0083, or any other, authorizing *local* rule-making or the use of *local* guidelines for red light camera enforcement. Therefore, under preemption principles, the City has been

administering its enforcement program in an unconstitutional manner.

The City advances several arguments in an effort to slip the grip of this Court's recent preemption precedent and the three express preemption provisions in chapter 316. None succeeds. The issue the City relegates to the end, the Act's own express preemption provision, section 316.0076, Fla. Stat., should be dispositive. The broad subject of "regulation of the use of cameras for enforcing the provisions of … chapter [316]" readily encompasses the topic of the review of camera images before the issuance of a citation based upon them, and that topic is treated by a provision of chapter 316. I. Br. at 40. Likewise, the City's tasking its private contractor with a set of unique substantive standards for the winnowing of camera images to be forwarded for potential prosecution also falls within the scope of section 316.007, Fla. Stat.

Turning first to section 316.0076, the City argues that the issue of how a municipality structures the review of red-light-camera images is not "regulation of the[ir] use," but a "wholly administrative procedure[.]" C. Br. at 17. That distinction between "regulation" verses "administration" does not even hold up in the statute itself, which treats administration of the camera programs as part and parcel of the State's own regulation of the subject. Section 316.0083(1)(a) opens with the phrase "[f]or purposes of *administering* this section" (emphasis added), and goes on to list important components of the statutory scheme, like authorizing

the issuance of a traffic citation for a red light camera violation, before addressing the use of an agent to review information from the cameras, within the same statutory sub-section. There is no indication that the Legislature considered the "review" of images to be of subsidiary import within the statutory enforcement scheme.

Notwithstanding that section 316.0076 refers to all of chapter 316, without limitation, the City also suggests that it should be read to preempt local regulation of *only* either the infrastructure of the camera equipment (*i.e.*, the placement and installation requirements for the cameras) or the use of the cameras to enforce traffic laws *other than* red-light violations. C. Br. at 17-19. This strained interpretation runs counter to the plain language of section 316.0076.

With respect to section 316.007, which bars local governments from "enact[ing] or enforc[ing] any ordinance on a matter covered by this chapter unless expressly authorized," the City advances two additional arguments. First, it contends that the chapter does not cover the matter of "the relationship between local police and its camera vendor," the space into which it tries to characterize its creation of substantive standards for its vendor to use to winnow out images to forward for prosecution. C. Br. at 15. That characterization is highly artificial. Those standards form an integral part of the City's administrative program of using red light cameras to enforce the traffic laws. And the chapter covers matters of

"administ[ration]," including the "review of information from" the cameras. § 316.0083(1)(a), Fla. Stat.[8] As noted, that review is narrowly circumscribed. Even if it were not, the BRQ would still be preempted because nothing in the chapter expressly authorizes a city to create from whole-cloth a set of substantive traffic enforcement standards and to contract with a private vendor to use them in screening red light camera images from prosecution.

The City's contention that "[t]he BRQ do not alter the mechanism by which a violation is enforced, once it is determined to exist" (C. Br. at 16) focuses on the wrong time frame. Those standards *do* alter the enforcement mechanism *before* a violation is determined to exist. They charge the contractor with weeding out cases the City chooses *not* to prosecute. But such decisions are also part of the enforcement process. *See, e.g.*, *Everton v. Willard*, 468 So. 2d 936, 939 (Fla. 1985) (decisions not to prosecute or enforce the law "are basic discretionary, judgmental decisions that are inherent in enforcing the laws of the state"). The City's adoption of substantive standards for what cases *not* to enforce therefore concerns the subject of enforcement of the traffic laws, a "matter" that, in the language of section 316.007, is certainly "covered by" chapter 316. And since those BRQ standards are not expressly authorized by statute, they are preempted.

[8] Indeed, the Wandall Act governs the nitty-gritty details of the administration of and enforcement procedures underlying a red-light-camera program. I. Br. at 3-4 (summarizing the various provisions).

Indeed, the City's BRQ standards actually *do* conflict with statutory standards for determining whether probable cause exists to establish a violation.[9] The City tries to analogize its BRQ standards to "an officer's exercise of discretion roadside when enforcing a red light violation." C. Br. at 16. That comparison does not hold. Take the right-turn-on-red scenario. State law establishes "careful and prudent" as the standard for permitted right turns on red, § 318.0083(1)(a), Fla. Stat., a measure plainly calling for the exercise of discretion. As this Court just clarified, "exercising discretion demands an individualized determination exercised according to the exigency of the case, upon a consideration of the attending circumstances." *Ayala v. Scott*, No. SC17-653, 2017 WL 3774788, *3 (Fla. Aug. 31, 2017) (internal quotation marks omitted). Yet the City, through its BRQ, has adopted a blanket policy *not* to exercise that discretion in connection with any vehicle traveling less than 15 miles per hour. I. Br. at 42 (citing R.257). Such a local decision conflicts with uniform state law. *Cf. Ayala*, 2017 WL 3774788 at *3 ("blanket policy" not to exercise case-specific discretion was "tantamount to a functional veto of state law") (quotation marks and brackets omitted). The City's

[9] So too, it seems, do some of the City's probable cause determinations. The reports the City urges be judicially noticed call into question its assertion that its officers follow state law in making probable cause determinations (C. Br. at 43). The law precludes the issuance of a citation for failure to stop before making a right turn on red. § 316.0083(1)(a), Fla. Stat. Yet, the City reported to the State that unless a driver stops, a notice of violation should be issued. C. App'x (FY 2015-2016) at 31.

right-on-red non-enforcement standard is not the only one of its BRQ which conflicts with state law.[10]

The City's hypothetical about assigning one traffic infraction enforcement officer to perform the winnowing process in accordance with its BRQ standards and another to review for issuance of citations (C. Br. at 16 n.7) does not illustrate a way out of the problem caused by having the contractor perform the winnowing function. An officer and a contractor are not similarly situated under section 316.0083(1)(a). That provision authorizes an officer to *issue* red-light-camera citations – the enforcement power, which necessarily includes the authority to review camera images against state law to make a probable cause determination. A private contractor, however, lacks the superior power to issue red-light-camera citations and thus enforce the traffic laws.[11] Because the power to make decisions *not* to enforce the law is constituent of the power to enforce, contractors likewise

[10] Another example lies in the City's BRQ rule that it does "not ... enforce camera-captured violations involving emergency vehicles with lights on." C. Br. at 43 n.27; *see* R. 259 (BRQ 6.2). That rule is also contrary to state law, which authorizes emergency vehicles with activated lights to proceed through red lights "but only after slowing down as ... necessary for safe operation" and "with due regard for the safety of all persons," §§ 316.072(5)(b)2. & (c), Fla. Stat. Although emergency vehicles therefore lack "carte blanche authority" to drive through red lights under any circumstance, *Brown v. City of Pinellas Park*, 557 So. 2d 161, n.4 (Fla. 2d DCA 1990), the City's BRQ represents a blanket enforcement decision never to exercise the discretionary call required by state law.

[11] Recall that the early versions of the bill that became the Act gave contractors that power to issue traffic citations, but it was withdrawn later. I. Br. at 29-31.

lack the authority to apply a set of substantive standards in deciding which cases do not get forwarded for prosecution. The City is therefore using a contractor to exercise enforcement power that the statute only confers on a traffic infraction enforcement officer. That remains problematic.

Aside from trying to duck the preemptive effect of sections 316.0076 and 316.007, the City instead attempts to locate positive authority for its promulgation of its own set of substantive standards governing the use of red light camera images in section 316.002's cross-reference to the "'enumerate[d] … area'" where municipalities can act. C. Br. at 13-14 (quoting § 316.002). This argument reads an awful lot like the dissent in *Masone*, 147 So. 3d at 499 (Pariente, J., dissenting). Five justices in that case, however, rejected that view, along with the parallel contention that the City advances (at 15), that the preemption provisions in sections 316.002 and 316.007 establish just a conflict-preemption regime. *Compare id.* at 498 (holding red light camera ordinance to be "expressly preempted" by § 316.007) *with id*. at 501 (dissent's contention that the majority's reasoning "seems to implicate conflict preemption"). This Court recently confirmed that *Masone* was decided on express-preemption grounds. *D'Agastino*, 220 So. 3d at 422.[12]

[12] The City misleadingly quotes *partial* language from this Court's decision in *City of Palm Bay v. Wells Fargo Bank*, 114 So. 3d 924 (Fla. 2015), to suggest that preemption is inapplicable so long as local regulation does not conflict with a state statute. C. Br. at 17, 33 (citing *Masone*, which in turn quotes *City of Palm Bay* for the principle that "where concurrent state and municipal regulation is permitted …

Along those same lines, the City also contends that section 316.008(8)(a)-(c), Fla. Stat., added by the Wandall Act, grants it "authority to implement a red light camera program." C. Br. at 14. That loose description of those provisions fails to acknowledge their actual language, which places them, like hands in a glove, right into the supplemental express-preemption provision of section 316.0076. They speak of "the *use* [of] traffic infraction detectors *to enforce*" red light traffic laws "*under s. 316.0083*." § 316.008(8)(a), Fla. Stat.; *see* § 316.008(8)(c), Fla. Stat. ("*Pursuant to s. 316.0083*, a ... municipality may *use* traffic infraction detectors *to enforce* …") (emphases added). Section 316.0076 expressly preempts the subject of "[r]egulation of the use of cameras for enforcing the provisions of [Chapter 316]." Thus, whatever authority the City has to implement its red light camera program must be bestowed by the Legislature.

The City also contends that sections 316.007 and 316.002 do not apply to the BRQ because they only cover local ordinances, and the BRQ standards are not located in an ordinance. C. Br. at 15 n.6. This argument ignores Jimenez's point

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a municipality's concurrent legislation must not conflict with state law."). The City's ellipsis omits the crucial qualifying phrase emphasized here: "where concurrent state and municipal regulation is permitted *because the state has not preemptively occupied a regulatory field*, a municipality's concurrent legislation must not conflict with state law." *City of Palm Bay*, 114 So. 3d at 928 (internal quotation marks and citation omitted). When a regulatory subject has been expressly preempted to the state, conflict with a municipal regulation in that field is not the relevant inquiry. Instead, local regulation must be expressly authorized.

that this Court has indicated that the preemptive field is broader, extending to "any action that conflicts with a state statute," not merely the enacting or enforcing of an ordinance in a preempted field. I. Br. at 43 (citing *City of Palm Bay*, 114 So. 3d at 929). The Attorney General appears to concede this point, given that she asserts that the relevant focus for preemption is upon "municipal *action.*" AG Br. at 23 (emphasis added). Furthermore, the City's position also neglects that section 316.0076 expressly preempts all "[r]egulation of the use of cameras" for enforcement purposes, without limiting the source of the regulation – be it adopted by ordinance or negotiated by contract in furtherance of an ordinance.

III. THE CITY'S ADOPTION OF ITS OWN LOCAL ENFORCEMENT STANDARDS VIOLATES THE UNIFORMITY PRINCIPLE OF CHAPTER 316.

The City caricatures Jimenez's uniformity argument, but fails to confront the serious conflict that its adoption of its own local BRQ standards poses to the statutory scheme. To start, the City ignores the uniformity principle in section 316.007, which requires that "[t]he provisions of this chapter shall be applicable and uniform throughout this state and in all … municipalities therein." Among the provisions of chapter 316 is that in section 316.0083(1)(a) which authorizes municipalities to use a private contractor to perform "a review of information from a traffic infraction enforcement detector." That "review of information" must therefore be "uniform" in all municipalities. If contractor review is limited to

assessment of the completeness and usability of the photographic data required by the statute (§ 316.003(87)), the review will be uniform in all municipalities. If "review" is broadened to include the application of substantive standards, which are nowhere to be found in the Act, and cities adopt their own disparate rules affecting the use of red light cameras to enforce traffic laws, the "review" will vary by jurisdiction.

The City's adoption of substantive local standards also runs afoul of the uniformity provision in section 316.002, which articulates "the legislative intent" that "uniform traffic laws … apply" across the state and "uniform traffic ordinances ... apply in all municipalities." As shown above, the City's adoption of its own standards creates variances in which traffic laws get applied in the City. The very nature of the BRQ, with its menu of options (I. Br. at 46) lends itself to an unlawful variation from one jurisdiction to another in the use of red light cameras to enforce traffic laws. Each of the 46 local jurisdictions using ATS (C. App'x (FY 2015-16) at 6) constructs their own local definitions of a red light violation and when to enforce or *not* enforce state law. *See* R.1408, 1422; 1466. In performing its substantive review and winnowing function, ATS has no discretion but to place those images that do not meet a particular municipality's definitions into the non-working queue, where such images will never be considered for prosecution. *See* R.1251-52.

By way of example, because Section 4.1 of the BRQ allows a municipality to choose among several options as the line of demarcation, the risk of non-uniformity among local ordinances is readily apparent.[13] While one municipality may choose the stop line and another the crosswalk line, that local choice of the line of demarcation will surely result in non-uniform enforcement standards (*i.e.*, the winnowing out of one but not another driver from the set of images to be forwarded for prosecution), notwithstanding the that two drivers in two different municipalities engaged in the same conduct. The same is true with regard to a variance in the threshold speed used to determine whether to reject or forward an image. Where a driver travels 12 mph, the image will be rejected and not subject to prosecution in the City, but would be forwarded and subject to prosecution in a city with a lower speed threshold.[14] The BRQ standards breed non-uniformity.

IV. BECAUSE THE TRAFFIC CITATION WAS ISSUED PURSUANT TO AN UNCONSTITUTIONAL EXERCISE OF MUNICIPAL POWER, IT SHOULD BE DISMISSED.

The City minimizes its unconstitutional exercise of police power as no more

[13] The City is mistaken that its selection in its BRQ of the "stop line" as the line of demarcation for all red light violations is permissible. (C. Br. at 45). The relevant statute for straight-on red light violations references the crosswalk, and if none, the intersection. § 316.075(1)(c)1., Fla. Stat. The City also is mistaken that there are no crosswalks within the city of Aventura; the photos on Mr. Jimenez's citation show otherwise. *See* R. App'x at 1, 5, 6.

[14] *See* C. App'x (FY 2013-14) at 25-30; (FY 2014-15) at 22; (FY 2015-16) at 31-32 (variation among cities' threshold speeds used to define "careful and prudent").

than a "technical defect in the implementation of the program" which does not warrant dismissal. C. Br. at 46, 49. Rather, as Jimenez has already articulated, this Court on several occasions has invalidated what it has found to be the unconstitutional exercise of government power, whether as a direct violation of a constitutional provision or as an unauthorized exercise of preempted power. I. Br. at 48-50. The City's issuance of Jimenez's red light camera citation is no less an unlawful exercise of power: the enforcement of this red light camera violation was accomplished by the City through its unauthorized regulation of the use of cameras by requiring ATS to apply the City's local BRQ standards to the camera images, an exercise of power within a preempted field and which has not otherwise been expressly authorized to the City.

Just because ATS's application of the City's unauthorized, substantive review standards to the facts of Jimenez's case allowed it to be forwarded to an officer for a subsequent probable cause determination does not erase the reality that the resulting citation was the product of an unconstitutional law enforcement process. The officer ultimately obtained the evidence through the City's unlawful assembly line for assessing red light camera images. The centrality of the contractor review to the City's program cannot be marginalized. The City admitted that without ATS's substantive pre-digestion of the high volume of camera data its detectors vacuum up, and winnowing out of nearly 40% of cases,

the police department would be "completely inundated." R.1290; P. App'x at 5. Given that admission, it is hardly "rank supposition" (C. Br. at 48 n.30) to conclude that the unlawful review program was absolutely essential to the functioning of the red light camera enforcement program that generated Jimenez's citation.[15]

The City suggests that *Kuhnlein* and *Arem* do not support the dismissal of Jimenez's citation because the remedies in both of those cases are premised on the invalidation of an entire program. C. Br. at 46-47. The City's attempt to limit the availability of the remedy of dismissal only to those circumstances in which an entire program or ordinance is invalidated ignores this Court's most recent decision in *D'Agastino*. After this Court found that the Civilian Investigative Panel's ("CIP") issuance of a subpoena to a law enforcement officer was preempted based on conflict with state statute and hence "unconstitutional," it did not go so far as to invalidate the entire ordinance which created the CIP. *D'Agastino*, 220 So. 3d at 426. But that did not hinder the Court's ability to remedy the CIP's unlawful

[15] The City's half-hearted standing argument, relegated to a footnote (at 45 n.28), is a non-starter. As the Third District observed, "no party raised the issue of whether Jimenez has standing to challenge" "the validity of the City's entire red light camera program and all [BRQ] guidelines." P. App'x at 17 n.3. Therefore, the issue has been waived. *Krivanek v. Take Back Tampa Pol. Comm.*, 625 So. 2d 840, 842 (Fla. 1993). Jimenez has standing to challenge the City's conduct because he was injured upon receipt of an unlawfully issued citation, *City of Hollywood v. Arem*, 154 So. 3d 359, 365 (Fla. 4th DCA 2014), and "citizens and taxpayers … have standing to challenge the constitutionality" of governmental action. *Dep't of Ed. v. Lewis*, 416 So. 2d 455, 459 (Fla. 1982).

exercise of a function that had been preempted: its issuance of the subpoena. Indeed, as a remedy, this Court quashed the district court's decision to the extent that it affirmed the CIP's authority to issue a subpoena. *Id.* at 427.

Consistent with *D'Agastino*, Jimenez disputes that the City must lack all power to operate a red-light-camera program for his citation to be dismissed. Rather, it is that portion of the City's program that entails the unlawful enforcement of the law through its private vendor's use of a set of locally created standards to select images to forward for prosecution which is preempted. And because the enforcement is completed by the issuance of a red-light-camera citation, dismissal is the appropriate remedy.

Respondents' reliance on criminal cases involving challenges based on a defect in a charging document[16] is misplaced. Even if the rule from those cases, premised on due process and double jeopardy principles, could be extended to this context, Jimenez has not argued that his traffic citation should be dismissed because of some defect in the citation.[17]

The constitutional infirmity of lack of governmental power runs deeper. The

[16] *State v. Phillips*, 463 So. 2d 1136, 1138 (Fla. 1985), *State v. Gray*, 435 So. 2d 816, 820 (Fla. 1983), *Delgado v. State*, 43 So. 3d 132, 134-135 (Fla. 3d DCA 2010), and *State v. Perez*, 783 So. 2d 1084 (Fla. 3d DCA 1998).

[17] Respondents cite one non-criminal case, *Loper v. State*, 840 So. 2d 1149 (Fla. 1st DCA 2003). The case did not involve an allegation of a citation derived from an unconstitutional arrogation of state power.

Legislature's assertion of preemptive power over local regulation confers "an immunity under the constitution be free from attempted [local] regulation," such that an enforcement action to impose a civil fine should be dismissed. *Sun Harbor Homeowners Ass'n, Inc. v. Broward Cty. Dep't of Nat. Res. Prot.*, 700 So. 2d 178, 181 (Fla. 4th DCA 1997), cited in *Metro. Dade Cty. v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 504 (Fla. 1999). "[I]t is the duty of this Court to enforce the constitutional limitations placed on the powers of political subdivisions." *Id.* at 505. The presence of a constitutional defect here distinguishes this case from those the City cites (at 49): the absence of an express remedy within the Act for such infirmity is immaterial. A court may order the dismissal of a citation as a remedy for an unconstitutional municipal exercise of law enforcement power. *Id*. at 505.

Last, the efforts of amici to extol the efficacy of red light camera programs is a public-policy issue that is plainly irrelevant to the issues in this case.[18]

CONCLUSION

Respectfully, this Court should answer the first certified question in the negative, the second and third in the affirmative, quash the decision of the Third District, and remand for dismissal of Jimenez's traffic citation.

[18] It should be noted, in fairness, that more recent statistics show that crashes actually *increased* after red light camera programs were installed. *See* C. App'x (FY 2014-2015 Report) at 5; (FY 2015-2016 Report) at 7.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being served via Florida Courts E-Filing Portal system on this 6th day of October, 2017, upon: Edward G. Guedes and Samuel I. Zeskind, Weiss Serota Helfman Cole & Boniske, P.L., 2525 Ponce de Leon Blvd., Suite 700, Coral Gables, Florida 33134, eguedes@wsh-law.com, szavala@wsh-law.com, szeskind@wsh-law.com, ozuniga@wsh-law.com; Rachel Nordby and Amit Agarwal, Office of the Attorney General, PL01-The Capitol, Tallahassee, FL 32399-1050,rachel.nordby@myfloridalegal.com, amit.agarwal@myfloridalegal.com; Robert Dietz, Office of the Attorney General, 501 E. Kennedy Blvd., Suite 1100, Tampa, Florida 33134, Robert.Dietz@myfloridalegal.com; E. Bruce Johnson and Christopher J. Stearns, Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A., 2455 East Sunrise Blvd., Suite 1000, Ft. Lauderdale, FL 33304, Johnson@jambg.com, stearns@jambg.com; Kraig A. Conn and David Cruz, Florida League of Cities, Inc., P.O. Box 1757, Tallahassee, FL 32302, kconn@flcities.com, dcruz@flcities.com.

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